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DETERMINABLE FEES IN AMERICAN JURISDICTIONS.

THE term "determinable or qualified fee"[1] is used habitually by some courts as synonymous with base fee or with fees subject to a conditional limitation, but in the history of English law the distinctions between these three classes of fees are very clear. Sometimes a determinable fee is confused with a fee upon condition, yet the distinction between the two species of estates is fundamental.

A determinable fee was a fee simple estate, but it was subject to a collateral limitation which might destroy it.[2] A gift to A and his heirs so long as St. Paul's stands, is one of the common instances given. When the word "determinable" is applied to a fee, it means an estate which is created by force of the common law, whether it be created by will or by deed.

A fee upon condition resembles a determinable or qualified fee in that it exhausts the whole estate. No remainder can be limited after either a fee upon condition or a determinable fee.[3] Both species of fees leave in the grantor a possibility of reverter, which

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[1] In Challis, Real Prop. the word "qualified" as applied to a fee is used with a different meaning from that stated above.

[2] Gray, Rule against Perp. § 13.

[3] See Palmer *v.* Cook, 159 Ill. 300; Kron *v.* Kron, 195 Ill. 181. A fee upon condition must, of course, be differentiated from the conditional fee, which was converted into an estate tail by the statute *De donis*.

is not alienable, but descends to the grantor's heirs.[1] But a determinable fee becomes a fee simple so soon as the contingency on which it is limited becomes impossible to happen; if the contingency happens, the estate is at once determined by force of the limitation, while a fee upon condition continues as a fee simple until entry by the grantor or his heir for breach of the condition.[2]

Base fees always arise upon a conveyance, either voluntary or involuntary, by the tenant in tail or the issue in tail. They are never created by the grantor of the estate which becomes transmuted into the base fee.[3] An involuntary creation of a base fee arose upon the attainder of the tenant in tail for high treason [4] or upon the outlawry for felony of the issue in tail.[5] Instances of base fees created by voluntary conveyance were a grant in fee by the tenant in tail, which gave the grantee a base fee determinable by entry of the issue in tail,[6] or a common fine by the tenant in tail, which created a base fee in the grantee which would endure so long as there was issue of the tenant in tail but no longer,[7] or

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1 Possibilities of reverter were at common law not assignable. Gray, Rule against Perp. §§ 12, 13. In Massachusetts the right of entry for condition broken is devisable; but the possibility of reverter upon a determinable fee seems not to be assignable, for otherwise, in First Univ. Soc. *v.* Boland, 155 Mass. 171, the remainder after such a fee would have been treated as a conveyance of the possibility of reverter. In Illinois it was said that the right of entry belonged to the grantor, his heirs or devisees, Boone *v.* Clark, 129 Ill. 466; but it was held not to be assignable in Waggoner *v.* Wabash R. Co., 185 Ill. 154. In North Carolina the possibility of reverter after a determinable fee is not assignable. Church *v.* Young, 130 N. C. 8. But in Maine see Moulton *v.* Trafton, 64 Me. 218; and in Pennsylvania see Slegel *v.* Lauer, 148 Pa. St. 236.

2 Mott *v.* Danville Seminary, 129 Ill. 403. Conditions are often treated as covenants, and the rule is to make them covenants if possible. Los Angeles Univ. *v.* Swarth, 107 Fed. Rep. 798; Gallaher *v.* Herbert, 117 Ill. 160; Boone *v.* Clark, 129 Ill. 466. Often they are trusts, see Jennings *v.* Jennings, 27 Ill. 518.

3 Christopher Corbet's case, 2 And. 134, found translated in Gray, Rule against Perp. § 35, is express to the point that a base fee is always created by something coming in after the creation of the estate tail, which becomes changed into a base fee. See list of base fees, Challis, Real Prop. 298 *et seq.*

4 Christopher Corbet's case, 2 And. 134; Gray, Rule against Perp. § 35.

5 Challis, Real Prop. 301.

6 Whiting *v.* Whiting, 4 Conn. 179; Perry *v.* Kline, 12 Cush. 118; Buxton *v.* Bowen, Fed. Cas. No. 2260; Buxton *v.* Uxbridge, 10 Met. 87; Hall *v.* Thayer, 5 Gray 523; Young *v.* Robinson, 5 N. J. Law 689; Pollock *v.* Speidel, 17 Oh. St. 439. For a feoffment with warranty see Gilliam *v.* Jacocks, 11 N. C. 310.

7 1 Am. L. Rev. 483. George Eliot's base fee in Felix Holt, supplied to her by Frederic Harrison, excited much discussion. Her statement is not very intelligible, but she probably means that John Justus Transome made a settlement upon himself for life, remainder to Thomas, his son in tail male, remainder to Bycliffe in fee. "Thomas, son of John Justus, proving a prodigal, had, without the knowledge of his

a fine with proclamations levied by the tenant in tail in remainder which endured so long as there was issue of the person levying the fine.[1] Base fees differ from determinable fees in that a valid vested remainder in fee may exist after a base fee.[2]

It is perhaps unnecessary to say that conditional limitations are the creatures of the statute of uses and the statute of wills.[3] The contingency upon which a conditional limitation is made is an event which acts as a limitation in cutting off one estate and as a condition precedent to another.[4] Such a limitation of an estate is impossible by mere common law conveyance,[5] although in some states statutes have changed this rule. While the rule against perpetuities applies to conditional limitations,[6] it does not apply to possibilities of reverter after determinable fees.[7]

Ever since the publication of the treatise entitled "The Rule against Perpetuities" by John Chipman Gray, it may be considered as having been demonstrated that the creation of a determinable fee, whether by deed or by will,[8] has been impossible for any one except the sovereign since the statute *Quia emptores*, wherever that statute is in force.[9] But no court in this country

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father, the tenant in possession, sold his own and his descendants' rights to a lawyer-cousin named Durfey." Unless Thomas after his father's death levied a common fine, or unless in his father's lifetime he levied a fine with proclamations, he did not sell his descendants' rights. See for a deed by the issue in tail, Hopkins *v.* Threlkeld, 3 Ha. & McH. 443, and Litt. § 615.

[1] 1 Am. L. Rev. 483; 3 Gray, Cas. Prop. 225. A fine with proclamations levied by the tenant in tail in possession passed a fee simple absolute.

[2] Challis, Real Prop. 52. The remainder must, of course, have been created by the original conveyance, which created the estate tail. It is said in Challis on Real Property that if a gift be made to A and his heirs so long as B has heirs of his body, a determinable fee is created, yet after such a fee existing as a base fee a vested remainder in fee is good. This fact should prove beyond all question that a base fee is not a determinable fee. See the distinction in 10 Rep. 97 b and Fearne, Cont. Rem. 372, 373. The court in First Nat. Bank *v.* DePauw, 75 Fed. Rep. 775, refers to 10 Rep. 97 b, as showing that a remainder is bad after a base fee, but the court must have overlooked the distinction there made.

[3] Gray, Rule against Perp. §§ 52, 135–139.

[4] Gray, Restraints on Alienation § 22, note 1.

[5] A remainder must await the regular determination of the preceding estate.

[6] Gray, Rule against Perp. § 66.

[7] First Univ. Soc. *v.* Boland, 155 Mass. 171.

[8] The cases of Collier *v.* McBean, 34 Beav. 426; Collier *v.* Walters, L. R. 17 Eq. 252; and McFarland *v.* McFarland, 177 Ill. 208, are all cases of collateral limitations of fees created by will, although in the later case there was a gift over.

[9] See Gray, Rule against Perp. § 31 *et seq.* and 3 L. Quart. Rev. 399, by the same author. The reply of Challis, 3 L. Quart. Rev. 403, is wholly inept. The reason of the conclusion stated in Gray, *ubi supra*, is that possibilities of reverter imply tenure,

seems to have been willing to accept a line of reasoning, which is unanswerable.[1] This result is mainly due to the fact that for authority upon this point the courts in this country are content with the confused statements of Blackstone[2] and Kent,[3] who have followed an imposing array of old English lawyers.[4] It would be presumptuous in the writer to again discuss the authorities noticed in Gray on the Rule against Perpetuities, but it may not be unprofitable to consider the later cases, not noticed by him, in order to ascertain what are these limitations that the courts continue to call determinable fees.

The instances of determinable fees to be noticed are divided into two classes: first, fees subject to special limitations, properly called determinable fees; and, second, fees subject to conditional limitations, improperly called determinable fees.

In regard to the first class of cases it may be premised that, assuming a determinable fee to be a proper limitation, the contingency upon which it is limited must be either an event which admits of becoming impossible to happen, or an event which, if it

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"and the Statute *Quia emptores* put an end to tenure between the grantor of an estate in fee simple and the grantee. Therefore, since the Statute, there can be no fee with a special or collateral limitation; and the attempted imposition of such a limitation is invalid." The effect of the statute is noticed in the old cases cited in Gray, Restraints on Alienation § 20. The reasons there given apply with peculiar force to determinable fees. The statute, however, seems to have had a different object. Its preamble (see 1 Gray, Cas. Prop. 386) shows that the purpose of the act was to protect the "chief lords of the fee." This phrase probably referred to the tenants *in capite* of the King, the large landowners. But at that time the phrase "*capitalis dominus*" had no very clear meaning. 1 Pollock & Mait. 212, n. 12, 2 *ibid.* 4, n. 3. It is probable that the statute was a compromise between the great landowners, who were opposed to all alienation by their tenants, and absolute freedom of alienation. 1 Pollock & Mait. 318. The dogma that the King was the chief lord of every fee was not then of much force. But by the time of the Wars of the Roses that doctrine had become thoroughly elaborated and the decisions upon the effect of the statute begin about that time. The King gained everything by the statute. Every alienation compelled the grantee to hold of him, for the grantee could not hold of his grantor by the terms of the statute. This view is confirmed by the fact that prior to the statute *De donis* deeds are found requiring the grantee to hold of the chief lord of the fee, who was probably the grantor's immediate lord. It is apparent that both the reversion after estates tail and the right of entry after condition broken would not be affected by this statute.

[1] The authorities of Gray are rejected in First Univ. Soc. *v.* Boland, 155 Mass. 171.

[2] Blackstone confounds base fees with determinable fees and fees upon condition. 2 Bl. Comm. 110, 154.

[3] Kent confuses fees subject to conditional limitations with base fees, fees determinable, and fees upon condition. 4 Kent Comm. 8. He follows Blackstone with some confusing additions of his own.

[4] The list from Coke to Preston is given in 3 L. Quart. Rev. 403.

does not happen, must forever remain liable to happen.[1] Of the fees made subject to special limitation there are two species: (*a*) created by the sovereign power; [2] (*b*) created by individuals.

(*a*) The general government, by its mineral laws, confers upon the citizen who makes a valid mineral location, an estate which endures so long as the locator performs the annual assessment work upon his claim.[3] This estate descends to the heirs, and is alienable in fee.[4] In the hands of the grantee, or devisee, or heir, it is the same kind of an estate. It seems to fulfil the description of a determinable fee,[5] yet it has been held to be not subject to dower.[6] Similarly, an entryman of a portion of the public domain not mineral obtains by his entry something which corresponds very closely to a determinable fee.[7]

If the theory of a taking of land under eminent domain by a public service corporation were that the government took the land upon payment of full value, and thereupon conveyed it to the corporation, to be held so long as it was used for the public purpose,

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[1] Challis, Real Prop. 227. It is said in Tiedeman on Real Property, § 385, that a limitation upon a contingency which must at some time happen, leaves a reversion in the grantor. He instances a gift to A and his heirs as long as a certain tree stands. He cites as his authorities 1 Preston Est. 440 (but Preston does not so say), and 1 Washburn, Real Prop. 90. Ayres *v.* Falkland (1697), 1 Ld. Raym. 325, says that merely a possibility of reverter remains after the gift of such an estate. This authority seems conclusive.

[2] The statute *Quia emptores* could not apply to the sovereign. Blackstone's determinable fee, created by the sovereign, the limitation of the barony of Lisle to John Talbot and his heirs tenants of the Manor of Kingston Lisle was, however, a limitation of a dignity, not of land. There seems to be a species of estate formerly existing by customary law, now by force of 14 and 15 Vict. cap. 94, in the mining regions of Derbyshire, which answers very closely to a determinable fee. See Bainbridge on Mines (4th ed.) 141; McSwinney on Mines 500.

[3] Jackson *v.* Roby, 109 U. S. 440; O'Reilly *v.* Campbell, 116 U. S. 418. No patent is necessary.

[4] Forbes *v.* Gracey, 94 U. S. 762; Belk *v.* Meagher, 104 U. S. 279; Gwillim *v.* Donnellan, 115 U. S. 45; Noyes *v.* Mantle, 127 U. S. 348.

[5] Some of the cases loosely speak of the mining claim as an estate upon condition. But no entry is necessary to determine the estate. It is true that the mineral claimant, by resuming work, may restore his rights, but that fact does not alter the legal situation. But see Benson M. Co. *v.* Alta M. Co., 145 U. S. 428, and Black *v.* Elkhorn M. Co., 163 U. S. 445, where the court uses some very extraordinary language as to the estate.

[6] Black *v.* Elkhorn M. Co., 163 U. S. 445. This case is put upon a wholly untenable ground. The decision in the Circuit Court of Appeals is put upon a much safer ground. See Black *v.* Elkhorn M. Co., 52 Fed. Rep. 859. The customary mining estate in Derbyshire was subject to dower. Bainbridge on Mines (4th ed.) 141.

[7] McLane *v.* Bovee, 35 Wis. 27.

the estate given to the corporation might be considered a determinable fee; but the different theory of an easement seems to have prevailed, and the statute *Quia emptores* has nothing to do with easements.[1]

(*b*) There are a number of cases which have supported, either by way of *dictum* or actual decision, the creation of determinable fees by private individuals. The decision in each case is put upon the ground that a fee can be made subject to a collateral limitation.

In Moulton *v.* Trafton[2] the facts that appear show that Shirley and wife had conveyed to Moulton certain land, reserving a parcel thereof stated in the deed to have been conveyed to Trafton so long as said Trafton occupied it with mills. Trafton had conveyed to Trafton the defendant, but there was no deed from Shirley to Trafton. The court must have held the reservation to be an exception. It construed the deed as conveying to Moulton all of the land excepting a determinable fee in the portion covered by the exception; and it seems to have been held that the deed conveyed that portion to Trafton. The deed must have been held to have conveyed from Shirley to Moulton the possibility of reverter after the determinable fee.

The same ruling was made where the grantor reserved to himself, out of the land conveyed, a parcel thereof so long as a store stood thereon.[3] This was held to reserve to the grantor a fee determinable. In both of these cases from Maine the statements of the court are purely *dicta*. In the first case an exception, in the second case a reservation, regardless of the extent of estate excepted or reserved, defeated the plaintiff. It was not necessary to characterize the estate. But it seems reasonably certain that if the question ever arises, that court will sustain what it calls "a base, qualified, or determinable fee."

In Pennsylvania, a state where *Quia emptores* is probably not in force,[4] it was held that a gift of land, so long as the same was not built upon, and was used in connection with a certain jail, created a determinable fee, which was held to have reverted to the grantor's

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[1] See Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83, where the court thought it was dealing with a determinable fee.

[2] 64 Me. 218. Whether a reservation or exception was involved, see Gould *v.* Howe, 131 Ill. 490.

[3] Farnsworth *v.* Perry, 83 Me. 447.

[4] Gray, Rule against Perp. § 26.

successor in interest, when the land ceased to be used in connection with the jail.[1] It was said expressly that this was not an estate upon condition.

In Grant *v.* Allen[2] a devise to a wife in fee, provided, however, that in case she married again the land should be divided among testator's children, was said to have created "a base or qualified fee" in the wife. But it ought to have been apparent to the court that this was a conditional limitation, which was good as an executory devise.[3] The Illinois court reached the same conclusion in regard to a similar devise in Illinois. It was called "a base, or determinable fee."[4]

The preceding cases were decided without any reference to the statute *Quia emptores*. It was assumed on the authority of Blackstone that "a base, qualified, or determinable fee" could be created. But in First Univ. Soc. *v.* Boland,[5] the court met the proposition fairly, and held that there was no legal impediment to the creation of a determinable fee. It was held that a gift of land in fee so long as it should be used for the propagation of certain religious doctrines, and when diverted from that purpose, remainder in fee to certain persons named, created a determinable fee with a possibility of reverter in the grantor and his heirs. The remainder over was held void for remoteness, but the possibility of reverter was held not to be within the rule against perpetuities. The statement as to the nature of the fee was *dictum*, for it was not necessary to decide whether the estate was a fee upon condition or a determinable fee.

An exceedingly peculiar determinable fee was held to have been created by a testator who devised certain lands, upon which an insane asylum was situated, to three persons named, to have and to hold the same so long as the devisees carried on upon the land

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1 Slegel *v.* Lauer, 148 Pa. St. 236. Earlier cases decided the same point.

2 100 Mo. 293. Challis, Real Prop. 230, would probably call this a determinable fee, but that authority is not cited in the opinion. If the limitation had been to the wife and her heirs until she remarried, without any limitation over, this court would logically be compelled to hold that the estate created was a determinable fee.

3 The contingency must have happened within the limits assigned by the rule against perpetuities.

4 Becker *v.* Becker, 206 Ill. 53.

5 155 Mass. 171. The court seemed to think that there was some reason for assuming the rule in Massachusetts to differ from the rule in England. The remainder in fee after the determinable fee is void not on account of remoteness, but because a fee cannot be limited after a fee, except by the aid of the statute of uses, or of wills, or some statute permitting a deed to be so drawn.

an institution for the insane.[1] It was further provided that if the devisees should at any time deem it inexpedient or unprofitable to carry on the institution, then on their written request the testator directed his executors to sell the real estate and divide the proceeds among certain persons, three of whom were the devisees. The case arose upon a bill in equity to ascertain the interests of the respective parties.[2] It would seem therefore that the court's holding that this was a fee in the devisees, determinable upon the written request of two of them, was not *dictum*.[3]

The case of Aultman Co. *v.* Gibson's Guardian [4] was a devise to the wife during widowhood, remainder to the children, the children of a deceased child to take in place of its parent. It was held that such child, living at the death of the testator, took a fee determinable upon his dying during the life of the wife, and since the estate of one child had been sold upon execution in his life and the child had died before the wife, the execution purchasers' estate was thereby determined.

The foregoing cases would, no doubt, be considered as authorities for the proposition that a determinable fee can now be created by individuals other than the sovereign.

The second class of what the courts call determinable fees arises upon gifts of fees conditioned upon a failure of issue. Some of the instances are easily explained as executory limitations, others cannot be so explained. The cases turn upon the point whether the gift over is upon an indefinite failure of issue, *i. e.* at any time after the donee's death, or upon a definite failure of issue confined to the date of the grantee's death.[5] The difference between the two

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1 McFarland *v.* McFarland, 177 Ill. 208. This should have been considered nothing more than a life estate, but under the section of the statute which gives a fee unless a smaller estate is indicated, it was held to be a fee.

2 The grounds of jurisdiction do not very clearly appear.

3 In other words, the devisees were given the power to deprive themselves of a fee, even though they refused to continue the testator's cherished asylum. *Quære*, if the devisees conveyed by warranty deed a fee simple and then determined their fee by direction to the executors, could they share in the proceeds of the executors' sale? Or would their equitable estate enure to their grantees after the grantees' fee was determined?

4 67 S. W. Rep. 57 (Ky.). The children either took a vested remainder in fee, or they took an estate tail, which the statute converted into a fee. The decision is exactly what it would have been at common law, if the child had an estate tail. The remainderman in tail sells only his interest.

5 It is not necessary to notice the case of a failure of issue confined to the life of the testator. See Matter of New York, etc., R. Co., 105 N. Y. 89.

limitations is perfectly clear.[1] In case of a gift over upon an indefinite failure of issue, which is always favored by the English law,[2] an estate tail is created in the first taker and the remainder over in fee is a vested remainder.[3] But in case of a gift over upon a definite failure of issue, the grantee takes a life estate, the issue take by implication a remainder in fee, which is contingent,[4] and the gift of the remainder over in fee is an alternative contingent remainder.[5] After these two contingent remainders there is always a reversion in the grantor, which is a true reversion and not a mere possibility of reverter.[6]

The decisions in the cases to be noticed are complicated by the fact that in most of the states there are statutes which convert estates tail either into estates in fee simple in the donee in tail,[7] or into a life estate in the donee in tail with a remainder in fee to the issue in tail, who take under the terms of the gift.[8] It must be reasonably apparent that every state which has such a statute must recognize the statute *De donis* as in force, for it is by that statute

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[1] See Gray, Rule against Perp. §§ 211–213.

[2] 2 Jarman on Wills 337, 408, 416.

[3] Boatman *v.* Boatman, 198 Ill. 414; Chapin *v.* Nott, 203 Ill. 341. See Gray, Rule against Perp. § 111. But in Hanley *v.* Kansas, etc., Co., 110 Fed. Rep. 62, land was devised to a trustee and his successors for two hundred years, remainder in fee to the county upon trust. The trust for two hundred years was to permit a former slave of the testator and the children of her body and their descendants to receive the rents and profits. There were other provisions in the will, but they are not material to the court's decision. On the authority of Gray, Rule against Perp., the remainder was held bad for remoteness. It is singular that a work so carefully precise in its statements should have produced this extraordinary decision.

[4] Burton *v.* Black, 30 Ga. 638; Wetter *v.* Cotton Press Co., 75 Ga. 440; Gray, Rule against Perp. 113 a, citing the older cases, Loddington *v.* Kime, 1 Salk. 224, Doe *v.* Holme, 3 Wils. 237; Goodright *v.* Dunham, Doug. 234 (per Lord Mansfield); Fearne, Cont. Rem. 225; Peoria *v.* Darst, 101 Ill. 609.

[5] The old cases cited in the last note show that the alternative remainder must be contingent, and to the same effect, Peoria *v.* Darst, 101 Ill. 609, but Chapin *v.* Nott, 203 Ill. 341, Boatman *v.* Boatman, 198 Ill. 414, wrongly held the second remainder to be vested. This is impossible, for a life estate with a vested remainder in fee exhausts the whole estate. There would be no room for a contingent remainder in fee. The court seemed to have forgotten that all remainders in fee after a contingent remainder in fee must also be contingent. Allison *v.* Allison Ex'rs, 44 S. E. Rep. 904 (Va.).

[6] Gray, Rule against Perp. §§ 11, 113 a. But in Dunwoodie *v.* Reed, 3 Serg. & R. 435, Chief Justice Tilghman says that two alternative remainders in fee are but the limitation of one indefeasible estate in fee. This is certainly plausible, but it must be wrong, for it puts the fee in abeyance.

[7] Indiana, Maryland, Mississippi, North Carolina, New York, Virginia, and other states.

[8] Illinois, Missouri, and New Jersey are instances of this class.

alone that estates tail exist.[1] The difference in the statutes as to estates tail creates two very well marked classes.

Wherever an estate tail is converted by statute into a fee simple an unexpected obstacle is put in the way of grantors or testators who desire their real property to descend to the issue of a given person, and, if that issue fails, to still further control the devolution of the property. If the property is given over upon an indefinite failure of the issue, an estate tail is created, which the statute converts into a fee simple in the first taker, with the result that the first taker acquires full power of alienation, and at the same time the remainder over is absolutely void as a remainder, and is void as an executory devise because the failure of issue is not confined to a period within the rule against perpetuities. Hence the courts in those states have considered themselves justified in holding that the words "dying without issue" mean a failure of issue at the donee's death. This does not help the matter to any extent, since the donee under such a limitation would take merely a life estate, there being a remainder in fee to the issue. Hereupon the courts go further and say that the donee takes a fee simple determinable upon his leaving issue him surviving. This step seems to be taken in order to give the donee the power to alienate a fee, but since he can alienate only a determinable fee which may be defeated by his dying without issue surviving, it is difficult to see how the situation is improved, or how the determinable fee, except on the ground of probability, is worth more than a life estate.

Some of the cases show the most astonishing confusion in the minds of the judges. In one opinion[2] the court holds a conditional limitation of a fee after a fee to be good in a deed not operating under the statute of uses, for the reason that it is good under the statute of uses, and that statute was merely declaratory of the common law. In the same opinion it was said that a conditional limitation of a fee after a fee upon a definite failure of issue was what "Lord Coke" calls "a base or qualified fee." Comment upon such amazing deliverances is unnecessary.

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[1] In Rowland *v.* Warren, 10 Ore. 129, it is suggested that such a statute repeals the statute *De donis*. If so, the old conditional fee at common law must be restored as it exists in South Carolina, where the statute *De donis* has never been in force. In regard to another statute as to estates tail it was argued that the conditional fee at common law was restored, but the court held otherwise. Frazer *v.* Supervisors, 74 Ill. 282.

[2] Bryan *v.* Spires, 1 Leg. Gaz. 191. The case is referred to simply as a curiosity.

The case of Grout *v.* Townsend[1] arose in New York, where a statute converts an estate tail into a fee simple. The court in this case was of opinion that a devise to a woman and the heirs of her body forever, but if she died without issue, remainder over in fee created an estate tail in the woman, which the statute converted into a fee simple, and that therefore the remainder over was void as a remainder but good as an executory devise, because the failure of issue was upon a definite failure of issue at the donee's death. The conclusion was there reached that the woman took a fee simple determinable upon her dying without issue surviving her. It is not often that a court can hold the very same words to mean both an indefinite failure of issue in order to create an estate tail and a definite failure of issue in order to create a determinable fee.[2]

The case of Davis *v.* Hollingsworth[3] presents the case of a gift by deed in a state where every executory limitation which is possible in a will is also good when contained in a deed. A gift was made to a daughter and her child or children should any be born to her, but in the event that the daughter should die without any child or children surviving her, the land should revert to the donor if living, or to his heirs if he was dead. The court construed this to mean that if the daughter died without issue living at her death, the limitation over should take effect. The limitation over was simply the reversion which the law implied, and hence the gift, under the doctrine of Wild's case,[4] was an estate tail, but even if not so, it was a life estate in the daughter, contingent remainder to the issue living at her death. The daughter, never having had a child, alienated in fee, then a child was born, who after the daughter's death brought ejectment. The daughter was held to have taken not an estate tail but a fee determinable upon her leaving issue. Thus it appears by construction that the statute

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[1] 2 Denio 336. The court seems to have decided at last that the limitation was to the woman and her heirs until she died without issue her surviving. Even Challis, Real Prop. 228–233, in his list of conditional limitations, shifting uses, and special limitations, which he classes as determinable fees, does not venture on such a qualified fee as the one stated in this case. It is needless to say that it was a life estate to A, implied contingent remainder in fee to the issue, if the limitation was upon a definite failure of issue.

[2] See Mott *v.* Fitzgibbon, *infra*, for a similar case.

[3] 113 Ga. 210. In this case the daughter's child had the fee simple. The limitation cannot be construed to be to the daughter for life, contingent remainder in fee to the unborn children.

[4] 6 Rep. 17.

De donis is repealed, and that the old conditional fee at common law is restored to the extent that the issue must not only be born, but survive the donee, in order to give the donee a fee simple.[1]

In Mott *v.* Fitzgibbon[2] a gift to a son for life, and upon the death of the son without issue, remainder over in fee, was held to be an estate tail in the son converted into a fee simple by statute, but this fee was determinable upon the son dying without leaving issue him surviving. This opinion is manifestly absurd, since a definite failure of issue means that the issue take as purchasers, whereas in case of an estate tail the issue must take by descent.

By statute in the state of Kentucky any limitation that is good in a will is good in a deed, and by a second statute any limitation after an estate tail is good if it would have been good when limited after a fee simple. It is plain that the first statute cannot apply to estates tail, unless the first statute is read into the second. With the statutory law in this condition a deed was made to B and the heirs of his body, and if he should die without issue, remainder over in fee.[3] B had alienated, but had died leaving issue. He was held to have taken a fee determinable, and upon his death fulfilling the condition, his grantee took a fee simple absolute.[4]

In this second class of determinable fees arising from gifts subject to a failure of issue, decisions are met which are based upon a statute which converts a fee tail, of which any one shall become seized, into a life estate in the donee, and " the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first grantee, devisee, or donee, in tail, first pass, according to the course of the common law."[5] This

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[1] The existence of issue is thus given a retrospective operation.

[2] 107 Tenn. 54. The remainder in fee could not be an executory devise. If it was after an estate tail, it was vested; if it was after a definite failure of issue, it was contingent. Viewed from any standpoint, the decision is inexplicable. But in Scottish-Am. Co. *v.* Buckley, 33 So. Rep. 416 (Miss.), a deed to three sons in fee, and if either died without leaving a child or children surviving, remainder in fee to survivor or survivors or their children, was held to be a vested remainder in the survivor. In Whitfield *v.* Garriss, 42 S. E. Rep. 568 (N. C.), on a similar limitation it was held that a devise to A, but if he died leaving no heirs, remainder over, gave a determinable fee.

[3] Louisville T. Co. *v.* Erdman, 58 S. W. Rep. 814 (Ky.). In Kentucky the court has argued itself into the belief that estates tail are unlawful, in spite of the fact that the statute expressly recognizes their validity.

[4] See also Calmes *v.* Jones, 63 S. W. Rep. 583 (Ky.). In Martin *v.* Hafer, 82 N. W. Rep. 1053 (Mich.), another unique decision of this description may be found.

[5] 1 Starr & Curtis 917. The framers of this statute evidently supposed that the statute *De donis* was a part of the common law. See Frazer *v.* Supervisors, 74 Ill. 282, where it is held that this statute did not restore the common law.

statute no doubt applies to estates in remainder as well as in possession.[1]

The first inference from this statute would be that since the persons to take in remainder on whom the estate would descend cannot be ascertained until the death of the first taker, the remainder in fee is contingent.[2] The statute simply transforms the estate tail into a limitation to the donee for life, remainder in fee to the issue surviving at the death of the donee in tail. It is, so far as the limitation is concerned, wholly immaterial whether the gift is to A and the heirs of his body or to A for life, remainder to his issue him surviving. The statute causes the former limitation to be the latter. The statute, of course, abolishes the Rule in Shelley's case as to estates tail.[3] Before the statute a remainder in fee after an estate tail was vested.[4] But under the statute the limitation would read as if it were to A for life, contingent remainder in fee to his issue him surviving, but if A die without issue him surviving, contingent remainder over in fee to B.

The first remainder in fee must be contingent; it cannot be vested, otherwise the second remainder would be bad.[5] The second remainder must be contingent, for it follows a contingent remainder in fee. Both remainders can be valid only on the ground that they are alternative contingent remainders.[6] This is the rule of the common law.

But singularly enough, in the state of Missouri a totally different view of the statute gives a life estate to the donee in tail, and the remainder in fee vests in the issue as soon as any issue comes into being.[7] This, of course, makes the estate vest in the children of

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[1] It is treated as applying to remainders in many of the following cases. The statute which turns estates tail into estates in fee simple does so apply. Vanderheyden *v.* Crandall, 2 Denio 9; Van Renssalaer *v.* Kearney, 11 How. (U. S.) 297.

[2] See Olney *v.* Hull, 21 Pick. 311; Smith *v.* Rice, 130 Mass. 441; Thomson *v.* Ludington, 104 Mass. 193; Dunwoodie *v.* Reed, 3 Serg. & R. 435.

[3] Frazer *v.* Board, 74 Ill. 282; Cooper *v.* Cooper, 76 Ill. 57; Lehndorf *v.* Cope, 122 Ill. 317.

[4] Boatman *v.* Boatman, 198 Ill. 414; Chapin *v.* Nott, 203 Ill. 341. In Smith *v.* Kimball, 153 Ill. 368, the court had said that a fee could not be limited after an estate tail. It followed 4 Kent Comm. 275, where the statement is made, but Kent was confused and was stating the rule as to chattels.

[5] No remainder in fee can be limited after a fee except by way of alternative remainder. See the cases next cited.

[6] Loddington *v.* Kime, 1 Salk. 224; Doe *v.* Holme, 3 Wils. 237; Goodright *v.* Dunham, Doug. 234; Fearne, Cont. Rem. 225; Allison *v.* Allison Ex'rs, 44 S. E. Rep. 904 (Va.); Peoria *v.* Darst, 101 Ill. 608.

[7] Garth *v.* Arnold, 115 Fed. Rep 468 (C. C. A.): A deed was made to A, habendum to A and the heirs of his body. A had seven children at the date of the convey-

the donee. The remainder is construed to be a class, and opens to let in afterborn children.[1] But if a child dies without issue before the death of the first taker, the vested remainder is not thereby divested, but the heirs of the deceased child take.[2] This ruling makes the limitation by the statute read to A for life, remainder in fee to his children, without more. Under this ruling, if A has two children and one child dies without issue before A, the fee in remainder upon the death of A does not vest in possession in the issue of A, the single child surviving, but one half of the devise vests in possession in the heirs of the deceased child. Yet the statute says that the remainder in fee after the life estate shall pass to the person or persons to whom the estate would go on the death of the first grantee. Again, suppose a remainder in fee to be limited over after an estate tail; it is destroyed by the birth of a child to the donee in tail. It cannot take effect as an executory devise to defeat the remainder in fee in the child and its heirs. Before the birth of a child it was not an executory devise, for at common law it was a vested remainder, and under the statute it was a contingent remainder.[3] Another astonishing result is that if in Missouri an estate is given to A, remainder in fee to B, and A has a child living at the time of the gift, the remainder over is neither remainder nor executory devise.[4]

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ance. In the lifetime of A three children died without issue. The remainder created by the statute was held to be vested, and the heirs of each of the three deceased took one seventh in remainder. Had there been a remainder over after the estate tail, the court would never have reached this astonishing conclusion. The court treated the statute as if it made a limitation to the first taker, remainder in fee to his children. In the Circuit Court (Arnold *v.* Garth, 106 Fed. Rep. 13), on the authority of the Missouri cases, Emmerson *v.* Hughes, 110 Mo. 630; Clarkson *v.* Hatton, 143 Mo. 47, the remainder was properly held to be contingent. Whether the courts of Missouri will follow this high Federal court remains to be seen.

[1] Garth *v.* Arnold, *supra.*

[2] Garth *v.* Arnold, *supra.* In any event the court ought to have held that the failure of a child's issue before the death of the first taker, divested its remainder.

[3] Since a remainder after an estate tail must necessarily be upon failure of issue, the only other alternative is to say that under the statute the limitation is to A for life, remainder in fee to his children, but if A die without having had issue, remainder over. These two remainders in fee would probably be considered alternative.

[4] This must be the result. It may be considered a good executory devise until the issue comes into being. The limitation reads according to the above ruling: to A for life, remainder in fee to his unborn children, but if A dies without issue surviving him, remainder over. Now, if no issue of A be born, the executory devise may take effect. But since the remainder in fee vests in the issue as soon as born, the executory devise over is gone, for the remainder descends to the heir general of the issue. It is not as if the limitation read to A for life, remainder to his children, but if any child dies in the

In Illinois, on the other hand, the courts have reached a conclusion diametrically opposed to the above result. In order to avoid the effect of the statute as to estates tail, they began by holding that a gift over upon a failure of issue would be treated as a gift over upon a definite failure of issue, to wit: a failure of issue at the death of the grantee.[1] But this was wholly unnecessary, for that had been held to be the effect of the statute. Wherever a gift was made to a man and the heirs of his body, the statute was applied, and the gift was held to be a life estate in the donee, remainder in fee to those answering the description of heirs of the body at the death of the donee.[2] Wherever a gift of the remainder in fee was made upon failure of issue, the court held it to be a definite failure of issue, and construed the first remainder to the issue to be contingent, and the second remainder to be an alternative contingent remainder.[3] Then there came a period when the court held that the grantee took a fee determinable upon his dying without issue.[4] But in the latest case the court has returned to its first theory of two alternative remainders.[5]

But the court appears to have taken a peculiar view of the first contingent remainder in the issue in tail. That remainder seems, according to the court's decision, to vest in the issue in tail when born; but if the issue dies in the lifetime of the first taker, its share descends only to its issue,[6] and not to the heir general of the deceased child, and if it dies without issue during the lifetime of the first taker, that particular issue is eliminated, and at the death of the donee in tail the issue then living take the remainder in fee. It thus appears that during the lifetime of the donee the remain-

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lifetime of A, his share to go to the survivor, and if all the children die in the lifetime of A, then over to B in fee. Wilbur *v.* McNulty, 75 Ga. 463. In the latter case the vested remainder in a living child becomes divested on its death in the life of A. See Smith *v.* West, 103 Ill. 332, incorrectly decided.

[1] Friedman *v.* Steiner, 107 Ill. 125; Peoria *v.* Darst, 101 Ill. 608.

[2] Blair *v.* Vanderclum, 71 Ill. 290; Lehndorf *v.* Cope, 122 Ill. 317; Lewis *v.* Pleasants, 143 Ill. 271, and other Illinois cases until the decision of Melzen *v.* Schopp, 202 Ill. 275.

[3] Peoria *v.* Darst, 101 Ill. 608, citing Loddington *v.* Kime, 1 Salk. 224.

[4] Friedman *v.* Steiner, 107 Ill. 125; Summers *v.* Smith, 127 Ill. 645; Post *v.* Rohrback, 142 Ill. 600; Smith *v.* Kimball, 153 Ill. 368; Lombard *v.* Witbeck, 173 Ill. 396; Koeffler *v.* Koeffler, 185 Ill. 261; Chapman *v.* Cheney, 191 Ill. 574; Gannon *v.* Peterson, 193 Ill. 372; Bradley *v.* Wallace, 202 Ill. 239.

[5] Chapin *v.* Nott, 203 Ill. 341.

[6] This appears to be an estate tail *pur autre vie*. There is strictly no descent to the issue of issue, but that issue holds as special occupant, although there is no such hint in any of the opinions.

der to the issue is treated as an estate tail; it becomes a fee simple upon the death of the donee in tail.[1] If no issue survive the donee, the other remainder in fee takes effect. It thus appears that there is one species of estate tail upon which the statute has no effect.

But the second remainder in fee, limited upon the definite failure of the issue, has received even more remarkable treatment. Although it is a remainder in fee alternative to another remainder in fee, it is solemnly asserted by the court that it is a vested remainder,[2] because, being a limitation to a man and his heirs, there is always some ascertained person in being to take, if the prior estates determine.[3] This result is exceedingly startling, not to say astounding. It is impossible to limit a remainder in fee after a vested remainder in fee, and it is none the less impossible to limit a vested remainder in fee after a contingent remainder in fee.[4] It is in effect saying that the vesting of the prior contingent remainder in fee divests the subsequent vested remainder in fee.[5]

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[1] Butler *v.* Heustis, 68 Ill. 594. In this case it is said that under the limitation of an estate tail, the first taker would take a life estate, the remainder would pass in fee simple to her children, opening to let in afterborn children and subject to be divested as to such as should die without issue. This statement is in fact *dictum*. In Voris *v.* Sloan, 68 Ill. 588, where a remainder was limited to C for life, remainder to the heirs of her body, and in case she should die without issue, reversion to grantor and his heirs, it was held that the dying without issue meant without having had issue. This hints at the old conditional fee at common law. Then it is said that this means a general failure of issue, that C took a life estate, remainder in fee vested in the heirs of C's body at their birth, and as to the two children who were dead without issue, C took as one of the heirs. This decision is wholly incomprehensible. But the two cases above, delivered apparently at the same time, are irreconcilable. In Frazer *v.* Supervisors, 74 Ill. 282, as to an estate tail, the court says that under the statute the heir takes at birth a fee simple. This is a startling commentary on *nemo est hæres viventis*. It is further said that the children when born take an absolute fee. Later in Peoria *v.* Darst, 101 Ill. 609, it is said that the contingent remainder in fee of the issue in tail is a mere contingent right, and if the issue dies before the life tenant, nothing passes to the heirs by descent. This is perhaps the controlling authority.

[2] Boatman *v.* Boatman, 198 Ill. 414; Chapin *v.* Nott, 203 Ill. 341. Compare Chapin *v.* Crow, 147 Ill. 219, which appears to be *contra*.

[3] Chapin *v.* Nott, 203 Ill. 341. The inaccuracy of the definition of the Revised Statutes of New York here appears in all its baldness. See Gray, Rule against Perp. § 107.

[4] Loddington *v.* Kime, 1 Salk. 224; Doe *v.* Holme, 3 Wils. 237; Goodright *v.* Dunham, Doug. 234; Fearne, Cont. Rem. 225. These old cases are not very accurate in their expressions. It must be plain that "without having had issue" is a very different thing from "without leaving issue surviving."

[5] The court seems to have been driven to these decisions by an impression that a contingent remainder does not descend to the heirs. The court was wholly confused between the two meanings of the word "vested." See Gray, Rule against Perp. § 118.

It may seem that this discussion as to this statute had led us far afield from the subject of determinable fees. But the point of the matter is, that after considering the limitation over upon failure of issue in accordance with the rules of law, the court seemingly, in order to avoid the effect of giving the first taker merely a life estate, changed its ground to giving the first taker a determinable fee. Very frequently this view is taken in order to protect a purchaser from the first taker.[1] In other cases the determinable fee seems to have been invoked in order to give the first taker an estate larger than a life estate, on some peculiar ground that was present to the court.[2] In two cases the court seemed to think that because the first taker was given an absolute power of alienation, he ought to be given a determinable fee,[3] but at the same time have, during his life, an absolute power of alienation.[4] In another case the determinable fee was invoked in order to destroy an attempt by a grandfather to make his estate inalienable until the end of the lives of his grandchildren,[5] depriving them at the same time of any control over the income. The legal estate was given to trustees to hold until the death of the last grandchild upon trust to pay the income to the grandchildren, and upon the death of any grandchild to its issue, and in default of such issue to the survivor

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[1] In Smith *v.* Kimball, 153 Ill. 368, a devise had been made to a woman, and should she die leaving no heirs, remainder over. She had issue living, and was attempting to force her title as a fee simple upon a purchaser.

[2] In Summers *v.* Smith, 127 Ill. 645, there being a gift over upon failure of issue, the same result precisely would have been reached, if the court had held that the first taker took a life estate, contingent remainder in fee to his issue surviving, contingent remainder in fee upon the definite failure of issue. Friedman *v.* Steiner, 107 Ill. 125, was a devise to the wife and her heirs and assigns, provided that in case the said wife died intestate and without leaving lawful issue her surviving, then over in fee. The court seemed to think that this could not be an estate tail on account of the word "assigns." But that word did not, of course, alter the estate. The wife was held to have full power of alienation. If so, the devise over was necessarily bad. See note 3, *infra.* As a matter of fact the gift over upon intestacy was bad. See Gray, Restraints on Alienation §§ 59, 61–75, collecting many, perhaps all, the cases. Yet the court held apparently, because the wife was living, having had no issue, and the action was by a co-tenant for partition, that she ought to be given the largest estate possible, which was to them a determinable fee, with a full power of alienation by deed or by will. She had, it is needless to say, a fee simple absolute.

[3] Friedman *v.* Steiner, 107 Ill. 125; Koeffler *v.* Koeffler, 185 Ill. 261. In both cases the devise over was bad. Healey *v.* Eastlake, 152 Ill. 424; Jones *v.* Port Huron Co., 171 Ill. 502; Saeger *v.* Bode, 181 Ill. 514; Dalrymple *v.* Leach, 192 Ill. 51.

[4] See the first two cases cited in the preceding note.

[5] Lombard *v.* Witbeck, 173 Ill. 396. In some way the court added the equitable estate in the grandchildren to the legal remainder given to their issue to make up a determinable fee in the grandchildren.

or survivors; the legal remainder in fee was given to the issue of the grandchildren surviving at the death of all the grandchildren, such issue taking *per stirpes*. The court held the estate given to be a fee in each grandchild determinable during the life of the longest living grandchild upon the grandchild dying leaving no issue surviving, and made the fee in the three grandchildren determinable upon all three dying leaving no issue surviving, and created cross-determinable fees among the grandchildren. In some mysterious way the trustees were dispossessed of the accumulated income over which they had been given absolute control. The result is sufficiently extraordinary.

It will be seen that all these cases are instances where an estate is given, but if the donee die without issue, remainder over. According to the authority of other cases decided in Illinois, the limitation in every case ought to have been treated as creating contingent remainders. It does not help the situation to give the first taker a determinable fee, for such an estate is worth but little more than a life estate. A purchaser from the first taker, if he prays for more than a life estate, takes the risk either that issue will be born and survive, or that the issue, if in being, will survive the first taker. In either case such a title is not marketable.

As a practical question there is not a very great difference in result between the theory of alternative remainders and the theory of determinable fees. If no issue be born, the first taker obtains but a life estate. If issue be born but do not survive, the first taker, under the theory of a determinable fee, has but a life estate, and the gift over takes effect as an executory devise; and under the theory of alternative remainders the first taker has a life estate, and the gift over takes effect as the vesting in possession of the estate in remainder. If issue be born and survive the first taker, the result as to those who take by descent is the same under both theories, but in the case of determinable fees the first taker's alienation is that of a fee simple, while under the theory of alternative remainders he has but a life estate, and can alienate no greater estate.

The general result of these so-called determinable fees is that in the states which convert an estate tail into a fee simple the statute *De donis* is nullified by saying that no estate tail is created, and the statute as to estates tail is nullified by depriving the first taker of a fee simple absolute. If the land passes to the heirs, the heirs

of the body alone take on the theory of determinable fees. In the states which convert an estate tail into a life estate with remainder in fee, the statute *De donis* is nullified and the issue in tail are deprived of their fee by allowing the first taker to alienate. If the land passes to the heirs, only the issue in tail, the heirs of the body, can take, yet for the purposes of alienation the first taker obtains the fee simple absolute. The first taker's estate for purposes of alienation is a fee simple, for purposes of descent is a fee tail. In both cases the character of the estate is altered at the moment of its devolution.

The best commentary upon these cases is the straits in which the Illinois court was placed by a limitation over of this character.[1] A testator devised land to his daughter for life, remainder in fee to her children and their issue, but if she died without issue, remainder over to his sons. He conveyed to the sons the residue of his estate. The daughter was well along in years, she had been married for many years, and there was no probability of issue. The land was valuable, but was unproductive. The brothers were anxious to assist by conveying all their estate to the sister. It could be made productive by a building mortgage. The court under its decisions should have held this to be not a fee tail in the daughter (for in that case the contingent remainder in the children created by statute is indestructible[2]), but a life estate in the daughter, contingent remainder in fee in the unborn issue, contingent remainder in fee to the brothers.[3] The reversion of the testator had passed to the brothers in the residue of the estate.[4] The sister by a conveyance in fee to her brothers would have destroyed the contingent remainder in her unborn issue,[5] the contingent remainders to the brothers and the vested reversion uniting in the brothers, their conveyance to her in fee would have given her a fee simple absolute. The opinion does not disclose what the court thought about the matter, except that it is said that the daughter had a life estate and the children a contingent remainder. The above obvious solution seems not to have been suggested, and

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[1] Gavin *v.* Curtis, 171 Ill. 640.

[2] Frazer *v.* Peoria Co. Supervisors, 74 Ill. 282.

[3] If this second remainder was vested as said in Boatman *v.* Boatman, *supra*, and Chapin *v.* Nott, *supra*, the contingent fee in the children was destroyed, or rather it never existed.

[4] See Gray, Rule against Perp. 113 a, where the case of Egerton *v.* Massey, 3 C. B. N. S. 338, is explained.

[5] Fearne, Cont. Rem. 322, 323; Frazer *v.* Peoria Co. Supervisors, 74 Ill. 282.

the court was driven to the unique proceeding of entertaining a bill in equity against the unborn issue and of appointing a trustee for them, as well as for the daughter and the brothers, with power to mortgage.

The conclusion to be deduced from all the cases herein is that in not one of them could the existence of a determinable fee properly so called, necessarily arise. In every one of them except the Massachusetts case, it is perfectly apparent that the court did not take into consideration the nature of a determinable fee.

It is, perhaps, needless to say that a true determinable fee is wholly unnecessary. Either the estate given should be considered a fee upon condition over which the law retains a control by controlling the right of entry, or the limitation ought to be considered as illegal. The instances of limitations upon failure of issue ought never to have been called determinable fees. If an estate tail be converted by statute into a fee simple, the creation of a determinable fee is nothing more than an attempt to nullify the statute and to give to the first taker of an estate tail a smaller estate than the statute gives him; but if the estate tail be converted by statute into a life estate in the first taker with remainder in fee to the issue in tail, the creation of the determinable fee is also an attempt to nullify the statute and to give to the first taker a larger estate than the statute gives him. The subject presents a curious study in the treatment accorded to statutes by the varying views of different courts.

John Maxcy Zane.

CHICAGO, ILLINOIS.